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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE AUG 2 2 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (TSC), denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on February 2, 2012, the AAO dismissed the appeal. The petitioner filed a motion to reconsider the AAO's decision. The motion will be dismissed.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a store supervisor pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, certified by the United States Department of Labor.

The director determined the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date. The director also determined that the ETA Form 9089 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director denied the petition accordingly.

On appeal, counsel stated that the discrepancies between the ETA Form 9089 which was filed to seek classification for an EB3 skilled worker position, and the Form I-140, which sought classification for a holder of an advanced degree, was clarified with a letter dated September 16, 2007 alerting the director that the wrong box was marked and a change was required to correct the obvious error requiring an advanced degree for a convenience store supervisor. Counsel further stated that the recruitment process at the labor certification stage was done with the correct requirement and approved as such.

On motion, counsel acknowledges that when he[1] prepared the Form I-140, he filed for the beneficiary to be classified as a member of the professions holding an advanced degree or an alien of exceptional ability. He states that he should have requested that the beneficiary be classified as a professional or skilled worker. Counsel argues that this "minor clerical error" should be overlooked and that the AAO's use of *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988), was misapplied because this petitioner did not try to make a material change to the submitted petition after a decision had already been made by the director. Counsel further states that the AAO's use of *Izummi* was far too rigid because the United States Citizenship and Immigration Services (USCIS) website allows for clerical errors to be corrected after petitions have been submitted. Counsel argues that the USCIS officer reviewing the petition should have acted in accordance with the principles of fundamental fairness and either realized that the correct category in the visa petition was for a skilled worker due to the attached labor certification and the petitioner's letter correcting the mistake, or at the very least issue a Request for Evidence or a Notice of Intent to Dismiss.

Although counsel argues that the AAO's use of *Izummi* was too rigid because the USCIS website allows for clerical errors to be corrected after petitions have been submitted, counsel submits no evidence of a USCIS policy that would have caused a Request for Evidence or a Notice of Intent to

[1] Counsel signed the Form I-140 on June 28, 2007 as its preparer.

Dismiss to be issued in this case. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). It is noted that while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, USCIS correspondence, website material and unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner's attempt to have the beneficiary be classified as a professional or skilled worker instead of as a member of the professions holding an advanced degree or an alien of exceptional ability is a material change to the petition. With respect to material changes to a petition, (sought in this case), the Board of Immigration Appeals (BIA) in *Izummi* emphasized:

> A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements.

As indicated above, *Izummi* does not support counsel's argument that material changes shall not be made only after a decision has already been made by the director but stands for the proposition that material changes may not be made after a petition such as a Form I-140 is filed.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy ... [and] must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). In this case, the law and USCIS policy were correctly applied A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party

seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.